

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2361 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

- =====
1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

MUKESH CHIMANLAL PANCHAL

Versus

STATE OF GUJARAT

Appearance:

MR LR PATHAN for Petitioner

Mr. H.L.Jani, AGP for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 11/06/2001

ORAL JUDGEMENT

Heard learned advocate Mr. Pathan for the
petitioner and Mr. Jani, learned APP for the respondent
State. In this petition, the petitioner has challenged

the impugned order of detention dated 21.6.2000 passed by the Commissioner of Police, Surat City considering that the petitioner is a dangerous person as defined under section 2(c) of the Gujarat Prevention of Anti Social Activities Act, 1985 ("the PASA Act" for short). The petitioner was detained in the District Jail at Bhavnagar as Class II detenu. The order of detention has been passed by the detaining authority under section 3(1) of the PASA Act. The grounds of detention were communicated to the petitioner under section (1) of the PASA Act. As per the grounds of detention annexure "B" to the petition, against the petitioner, total eight offences have been registered under section 379 of the Indian Penal Code and the petitioner was arrested by order dated 1.3.2000, 2.3.2000 and 6.3.2000.

Present petition challenging the detention order was filed by the petitioner on 30.3.2001 and rule has been issued by this court on 4th April, 2001.

3. The respondent State has not filed any affidavit in reply to the present petition though sufficient opportunity has been given to the respondent State.

4. Learned advocate Mr. Pathan has submitted that various contentions have been raised in this petition for challenging the impugned order of detention. However, according to him, two contentions are enough to set aside the order of detention. According to him, one fact is not in dispute that as per the observations made by the detaining authority, at the time of passing of the impugned order of detention, the petitioner detenu was in judicial custody. The second contention raised by Mr. Pathan is that the detaining authority has observed that the offences registered against the petitioner under section 379 of the IP Code are bailable offences. Considering this aspect, according to Mr. Pathan, the detaining authority has not applied his mind while passing the impugned order of detention and there was no cogent material before the detaining authority to have apprehension that the petitioner will be released on bail because of the registration of bailable offences against him. This itself shows non application of mind on the part of the detaining authority. Learned advocate Mr. Pathan has relied upon the decision of the apex court reported in 1985 (4) SCC 232 in case of Ramesh Yadav versus District Magistrate and another; 2000(1) SCC 341 : 2000 AIR SCW page 4203 in case of Amratlal and others versus Union of India. According to Mr. Pathan, learned advocate for the petitioner, the contentions raised by the petitioner are covered by the said decisions of the

apex court and, therefore, the impugned order of detention is required to be quashed and set aside.

5. Learned AGP Mr. Jani appearing for the State has fairly submitted that the offences under section 379 of the Indian Penal Code are non bailable offences as per the schedule and there is apparently non application of mind on the part of the detaining authority in considering that the said offences are bailable offences. However, he has submitted that the decision of the apex court in case of *Amratlal versus Union of India* 2000 AIR SCW 4203 has been considered by the Full Bench of this Court in case of *Koli Bharat Uka Vegad versus District Magistrate*, decided on 4th May, 2001, in special civil application No. 9579 of 2000. He has relied upon the decision of this court reported in 1988 (2) GLH 475 in case of *Nasimbanu Munnamiya Shaikh versus Commissioner of Police, Ahmedabad*. Therefore, according to Mr. Jani, order of detention has rightly been passed by the detaining authority.

6. I have considered the arguments of the learned advocates for the respective parties. I have considered the two contentions raised by the learned advocate Mr. Pathan, that at the time of passing of the order of detention, the petitioner was in judicial custody and the another contention that the offences alleged to have been committed by the petitioner under section 379 of the IPC are bailable offences as per the observations made by the detaining authority in the grounds of detention shows non application of mind on the part of the detaining authority. In the grounds of detention, the detaining authority has considered that the said offences are bailable. It is also clear that at the time of passing of the impugned order of detention, the petitioner was in judicial custody. This shows that there is non application of mind on the part of the detaining authority.

In case of *Ramesh Yadav v. District Magistrate* and another (*supra*), the apex court has observed as under:

"6. On a reading of the grounds, particularly the paragraph which we have extracted above, it is clear that the order of detention was passed as the detaining authority was apprehensive that in case the detenu was released on bail, he would again carry on his criminal activities in the area. If the apprehension of the detaining authority was true, the bail application had to

be opposed and in case bail was granted, challenge against that order in the higher forum had to be raised. Merely on the ground that an accused in detention as an under trial prisoner was likely to get bail an order of detention under the National Security Act would not ordinarily be passed. We are inclined to agree with counsel for the petitioner that the order of detention in the circumstances is not sustainable and is contrary to the well settled principles indicated by this Court in a series of cases relating to preventive detention. The impugned order has therefore, to be quashed."

In light of the said decision, considering the facts of this case, there is no observations made by the detaining authority in the grounds of detention that any bail application has been filed by the petitioner in respect of the offences registered against him. There is no averment to that effect and there was no material with the detaining authority to have the reasonable apprehension of the petitioner's release on bail and to indulge in the same activities again after release on bail.

In case of *Amratlal and others versus Union of India* (supra), the apex court has observed that while passing the order of detention, subjective satisfaction of the detaining authority is required to be established from the record. If the detenu is already in jail, then, the detaining authority must be satisfied on the basis of the available cogent material about likelihood of the detenu being released on bail and not merely about likelihood of his moving an application for bail. In absence of such subjective satisfaction, order of detention cannot sustain. Therefore, in view of the observations made by the apex court and looking to the facts and circumstances of the case, there is no observation made by the detaining authority in the grounds of detention that there was application filed by the petitioner for his being released on bail in respect of the bailable offences under section 379 of the IPC. There was no material before the detaining authority to have some reasonable apprehension about the petitioner to be released on bail. Therefore, considering these facts of the case, according to my opinion, the detaining authority has not applied mind properly. It amounts to non application of mind. As per the Schedule, the offences under section 379 are non bailable. However, the detaining authority has observed that such offences are bailable offences and there was no material available with the detaining authority which is having reasonable

apprehension in the mind of the detaining authority that the petitioner will be released on bail. In absence of such material, subjective satisfaction is not established, looking to the facts of the present case.

However, learned advocate Mr. Jani has relied upon the decision of the division bench of this court reported in 1988 (2) GLH 475 in case of Nasimbanu. Now, this decision is in respect of lesser drastic remedy of cancellation of bail and the division bench of this court has held that the non consideration of this aspect of cancellation of bail as a lesser drastic remedy would not amount to non application of mind. Thus, the facts of the present case are different. Therefore, this decision is not helpful to the State. However, Mr. Jani has also relied upon the decision of the full bench of this court in special civil application no. 9579 of 2000 dated 4.5.2001. In para 41, Full Bench of this Court has considered the decision of the apex court in case of Amratlal and another versus Union Government (supra). The observations made by the full bench are that this decision shows that the detention order can be passed even though the detenu is in judicial custody if there is cogent material to indicate that he is likely to be released on bail. There is no dispute on this legal proposition that while the detenu is in judicial custody, order of detention can be passed but one aspect is also required to be kept in mind that there must be some cogent evidence to indicate that the detenu is likely to be released on bail and in absence of such material, subjective satisfaction cannot be said to have been established. In the instant case, such subjective satisfaction has not been established. Therefore, this decision of the full bench and also the decision of the division bench in 1988 (2) GLH 475 are not helpful to the respondent State in the facts and circumstances of the present case.

Looking to the observations made hereinabove, according to my opinion, the impugned order of detention dated 21.6.2000 passed by the Commissioner of Police, Surat City is required to be quashed and set aside.

For the reasons recorded hereinabove, the petition succeeds and the same is allowed. The order of detention dated 21.6.2000 is vitiated and resulted to quash and set aside. The detenu Mukesh Chimanlal Panchal who has been detained at the District Jail, Bhavnagar be set at liberty forthwith if he is not required in any other case. Rule is made absolute accordingly. No order

as to costs. Direct Service is Permitted.

11.6.2001. (H.K. Rathod, J.)